

**MTSBA**"...fostering excellence in public education
through
school board leadership."

TO: House Education Committee

FROM: Debra A. Silk, Associate Exec. Dir. / General Counsel
Montana School Boards Association

RE: HB352

DATE: Friday, January 26, 2007

The Montana School Boards Association appreciates Representative Barrett's introduction of HB352. As representatives of public schools, the Association assists Montana schools in the investigations and discipline of students who are determined to have engaged in misconduct, including those students who engage in threatening and/or violent behavior. While we adamantly acknowledge and support efforts to curtail behavior that is harmful to others, MTSBA opposes the bill as written for the following reasons:

- This bill impinges on local control and will impede a school board's rights under Article X, Section 8 of Montana's Constitution to "supervise and control" the schools within their boundaries. Section 20-5-202 already requires local school districts to establish policies "defining the authority and procedure to be used by a teacher, superintendent, or principal in suspending a pupil and defining the circumstances and procedures by which the trustees may expel a pupil."
- The language in (2)(a) referencing a student who "harms or threatens to harm another person" needs to remain in the bill. The amendments to the bill focus on "threats," but leave out any specific reference to actual "harm." Section 20-5-201, MCA, as currently adopted addresses both harm and threats of harm.
- By requiring school districts to adopt policies that distinguish improper student behavior of varying severity and its corresponding consequences, school districts no longer have the authority to handle individual matters of discipline on a case-by-case basis, taking into consideration, for example, prior disciplinary actions of a student v. a student that has had no prior disciplinary sanctions, the circumstances surrounding the student's behavior. This again should remain an issue of local control.
- As to the provision regarding threats to students, the Ninth Circuit Court of Appeals has addressed this in a number of cases. For example, in the case of *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990), the court stated that issue to be decided is "whether a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intent to harm or assault." In another instructional federal case from California, the district court and later the Ninth Circuit Court of Appeals were asked to construe a statement made by a high school sophomore to her guidance counselor. The statement could have been interpreted as an innocuous expression of frustration, or as an actual threat. The student admitted to saying, "I am so angry, I could just shoot someone." The student characterized her statements as a figure of speech, while the school counselor to whom the statement was made considered it a threat. The district

court held that the school system had violated the student's right to freedom of speech, because the statement did not rise to a sufficient level of a "threat" required by law ... to allow infringement on her right of free speech." *Lovell v. Poway Unified School Dist.*, 90 F.3d 367 (9th Cir. 1996), *rev'g.* 847 F.Supp. 780, 783 (S.D. Cal. 1994), *cert. denied* 518 U.S. 1048, 117 S.Ct. 27, 135 L.Ed.2d 1120 (1996). In reversing the district court decision, the Ninth Circuit Court of Appeals ruled that threatening statements, such as the one at issue, are not entitled to First Amendment protections in any event, regardless of whether they are made in or out of the school setting. In its ruling, the Ninth Circuit specifically noted the level of school violence with which school officials must contend: "In light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students." *Lovell*, 90 F.3d 367, 372. ***The court concluded with a useful test to analyze such statements: "While courts may consider the effect on the listener when determining whether a statement constitutes a true threat, the final result turns upon whether a reasonable person in these circumstances should have foreseen that his or her words would have this effect."*** *Id.* at 373. In summary, allegations of threats need to be handled on a case-by-case basis by school officials.

- As written, subsection (1)(b) is overly broad and vague. This section refers to a pupil who "defaces or damages another person's property." This section does not limit the defacement or damage to another person's property while at school or under the jurisdiction of a school district. For example, if a student defaces or damages the property of another on a weekend or outside of the jurisdiction of the school district, the school district would not be involved unless the school district can show a nexus between the student's conduct and the effect on the educational process.
- Although we do not take exception to the parent(s) of a child being notified of an actual threat, until the school district performs a proper investigation of the incident, the district is required to treat the incident as an "allegation" and not jump to conclusions before properly investigating the allegations. The requirement of a school district to conduct a fair and impartial investigation ensures fairness to all involved and provides students with due process as required by law.
- As written, subsection (1)(c)(ii) violates federal law by requiring "notification of the parent or guardian of the student who has received the threat regarding both the incident ***and the specific resulting action that will be taken by the school.***" Emphasis added. The Family Educational Rights and Privacy Act ("FERPA") protects the disclosure of information from educational records (including disciplinary sanctions imposed on a particular student) to outside third parties without the consent of the parent of the child. Disclosure of discipline to others would constitute a violation of FERPA and would jeopardize a local school district's federal funding.

We have suggested several amendments to the bill and have copies of those proposed amendments available.

Thank you.